Sowa v Zabar
2020 NY Slip Op 32108(U)
June 30, 2020
Supreme Court, New York County
Docket Number: 152161/2016
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 152161/2016

KATARZYNA SOWA,

MOTION SEQ. NO. 002 003

Plaintiff,

- v -

ELI ZABAR, SONDRA ZABAR, DEVON FREDERICKS, ELI ZABAR AND SONDRA ZABAR, AS TRUSTEES OF THE DEVON FREDERICKS 2012 FAMILY TRUST DATED OCTOBER 10, 2012, DEVON FREDERICKS AND SONDRA ZABAR, TRUSTEES OF THE ELI ZABAR 2012 FAMILY TRUST DATED OCTOBER 10, 2012, THE DEVON FREDERICKS 2012 FAMILY TRUST DATED OCTOBER 10, 2012, THE ELI ZABAR 2012 FAMILY TRUST DATED OCTOBER 10, 2012, and E.A.T IS OWNED BY ELI ZABAR INC.,

DECISION + ORDER ON MOTION

Defendants.

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DEVON FREDERICKS AND SONDRA ZABAR, TRUSTEES OF THE ELI ZABAR 2012 FAMILY TRUST DATED OCTOBER 10, 2012

Third-Party
Index No. 595809/2017

Plaintiffs,

-against-

NYC ELITE GYMNASTICS II, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 107, 108, 108, 138, 142, 148, 149, 150, 151, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 143, 144, 145, 146, 147

were read on this motion for SUMMARY JUDGMENT.

Argyropoulos & Associates, Queens, NY (Philip Argyropoulos of counsel), for plaintiff.
Correia, King, Fodera, McGinnis & Liferiedge, New York, NY (Thomas J. King of counsel), for defendants/third-party plaintiffs.
Gerber Ciano Kelly Brady LLP, Garden City, NY (Jeffrey Migdalen of counsel), for third-party defendant.

Gerald Lebovits, J.:

Plaintiff Katarzyna Sowa was employed by third-party defendant NYC Elite Gymnastics II, Inc. She was injured when she fell down a small set of steps in premises leased to NYC Elite by two family trusts.[1] Plaintiff brought personal-injury claims against those trusts through their trustees, against the trustees in their individual capacity, and against another related company occupying part of the same building. One of the trusts impleaded NYC Elite.

In motion sequence 002, the various individuals and entities sued by Sowa (collectively, the Zabar defendants) move for summary judgment dismissing plaintiff's complaint and all cross claims interposed against them. In motion sequence 003, NYC Elite moves for summary judgment dismissing the third-party claim against it. Motion sequences 002 and 003 are consolidated here for disposition.

NYC Elite's summary-judgment motion is granted. The Zabar defendants' summary-judgment motion is denied as academic.

BACKGROUND

The Parties

Plaintiff was formerly an employee of third-party defendant, NYC Elite, a gymnastics studio/gym located at 421 East 91st Street, New York, New York (the premises).

Defendant Eli Zabar (E Zabar) is sued as an individual and as a trustee of the Devon Fredericks 2012 Family Trust dated October 12, 2012 (Fredericks Trust). E Zabar is an officer of defendant E.A.T., a food and restaurant business, located at 1064 Madison Avenue.

NYC Elite entered into a 15-year lease of the premises from Eldev Development Corp. (Eldev) on July 13, 2009. E Zabar is the chief executive officer of Eldev. Title to the premises and property located at 429-433 East 91st Street, had been subsequently conveyed by Eldev to E Zabar and Devon Fredericks, each receiving an undivided 50% interest as tenants in common. Title to the two properties was then conveyed to the two defendant trusts, i.e., the Eli Zabar 2012 Family Trust dated October 10, 2012 (Zabar Trust) and the Fredericks Trust, by two deeds dated December 12, 2012. The grantors of the Zabar Trust were E Zabar to Fredericks and Sondra Zabar (S Zabar) as trustees of the Zabar Trust, and the grantor of the Fredericks trust was

[1] Defendants Eli Zabar 2012 Family Trust dated October 10, 2012, through its trustees Devon Fredericks and Sondra Zabar; and Devon Fredericks 2012 Family Trust dated October 12, 2012, through its trustees Eli Zabar and Sondra Zabar.

Fredericks to E Zabar and S Zabar, as trustees of the Fredericks Trust. Each deed conveyed the grantor a 50% undivided tenant in common interest to the respective trust (defendants exhibit E).

General Background

On February 26, 2014, plaintiff sustained personal injuries when she fell while working at NYC Elite. At the time of the accident, plaintiff was employed by NYC Elite as a housekeeper/cleaning person. Plaintiff was an employee there since September 2009, working 37 hours a week. Plaintiff fell while descending two steps that lead to a cleaning supply closet located inside the women's locker room at NYC Elite.

The action was commenced by plaintiff, who filed and served a summons and complaint dated March 11, 2016 against the Zabar defendants. On June 29, 2016, plaintiff filed and served a supplemental summons and complaint adding, E.A.T. Is Owned by Eli Zabar, Inc. On October 4, 2017, the Zabar defendants commenced a third-party action naming NYC Elite as a defendant.

Plaintiff's Testimony dated July 6, 2017 and September 5, 2018

Plaintiff testified that on the day of the accident, she entered the women's locker room where the supply closet was located, and retrieved supplies at least two or three times before she fell that day (plaintiff 2017 EBT at 26, plaintiff 2018 EBT at 24). She went to get paper towels from the cleaning supply closet. She climbed the two stairs, entered the cleaning supply closet, took two rolls of paper towels, turned around and fell. Plaintiff testified that the area was dangerous, that there is little room, and she had to hold on to the door frame every time she went down the steps (plaintiff 2017 EBT at 29-30, 34). Plaintiff never had an accident on those steps prior to February 26, 2014 (*id*. at 33; plaintiff 2018 EBT at 27). Plaintiff never complained to anyone regarding the steps to the cleaning supply closet (plaintiff 2018 EBT at 23-24).

Plaintiff testified that she turned around, fell and found herself on the floor (plaintiff 2017 EBT at 36-37, 39). She did not remember if she was in the process of descending or if she fell from the closet or if she was holding any part of the door or closet (*id.*). Plaintiff's entire body was on the floor after she fell (*id*. at 41). Plaintiff has not returned to the gym since the accident (*id*. at 50).[2]

NYC Elite Testimony dated February 27, 2019

Tina Ferriola, co-owner of NYC Elite, appeared for an examination before trial (EBT) (T Ferriola EBT). Ferriola authenticated the lease between NYC Elite and the Zabar defendants (T

[2] Plaintiff also submits an affidavit in support of her claim. The affidavit, however, is written in English, a language in which plaintiff undisputedly lacks fluency. (She testified at her EBTs through a Polish interpreter, for example.) And plaintiff has not submitted the original non-English affidavit and an attestation from the translator, as required in these circumstances (*see Eustaquio v 860 Cortlandt Holdings Inc.*, 95 AD3d 548, 548 [1st Dept 2012]). This court therefore declines to give weight to this affidavit.

Ferriola EBT at 35-36). Ferriola testified that before they opened NYC Elite for business, they modified the space to fit their needs as a gymnastics studio (*id*. at 11-12). They installed three new bathrooms, including a bathroom in the women's locker room (*id.* at 13, 16). Ferriola testified that the steps leading to the supply closet were already constructed, and NYC Elite decided to use it as a storage closet for cleaning supplies (*id*. at 17). According to Ferriola, no modifications were made to the steps except that tiles were put on the preexisting steps (*id*. at 17, 18). Ferriola did not know if the contractor did any work on the inside of the closet (*id.* at 18-19) but testified that the closet was not a bathroom before the renovation took place, and that there were no remnants of a bathroom inside the supply closet (*id*. at 33).

Ferriola could not recall whether the landlord approved the construction work (*id.* at 22-23), though she did recall Eli Zabar coming to the premises while the construction was going on (*id*. at 26). Ferriola admits that there is no banister on the two steps leading to the outside of the cleaning supply closet (*id*. at 28). Ferriola testified that there are shelves in the cleaning supply closet to store supplies, but she did not know if they were installed as part of the construction work (*id.* at 36-37). Ferriola never received any complaints about the stairs leading up to the storage closet prior to plaintiff's accident (*id*. at 38).

Affidavit of Kelly Scott, P.E. (NYC Elite's Expert)

Kelly Scott is a professional engineer licensed in the State of New York. Scott reviewed the relevant pleadings and examinations before trial and performed an inspection of the stairs on July 18, 2019. Specifically, Scott performed "Dynamic Coefficient of Friction Testing" on the two surfaces of the steps and the supply closet floor (Scott aff, ¶ 9). The tests were performed in accordance with the most current American National Standard Institute (ANSI) A326.3-2017 standard, entitled "American National Standard Test Method for Measuring Dynamic Coefficient of Friction of Hard Surface Flooring Materials" (*id*.). According to these tests, the measurements of both the interior closet tile and the exterior steps exceeded the slip resistant surface standard (*id*., ¶¶ 10, 11). Scott avers that he is of the opinion that the mosaic tile installed on the supply closet floor and the tile on the two steps leading to the supply closet are appropriate materials for use as walking surfaces and did not constitute an unreasonably dangerous trip or fall hazard (*id*., ¶ 13).

Scott noted that the building, having been constructed in 1930 under the 1929 Building Code of the City of New York, does not include definitions of a required interior stairway (*id*.), but that it is common practice in New York City to rely upon the definitions set forth in the 1968 Building Code of the City of New York (1968 Building Code), which does define a stairway (*id*.). Under the 1968 Building Code, "access stair" is defined as a stair between two floors which does not serve as a required exit. Exit is defined as

> "a means of egress from the interior of a building to an open exterior space which is provided by the use of the following, either singly or in combination: exterior door openings, vertical exits, exit passageways, horizontal exits, interior stairs, exterior stairs or fire escapes; but not including access stairs, aisles, corridor doors or corridors."

Interior stairs is defined as a stair within a building that serves as a required exit. In light of these definitions, Scott opines that the stairs leading to the supply closet is not an interior stairway as defined under the 1968 Building Code, as it does not provide a means of egress to the street or public area of the premises, but rather are access stairs (Scott aff, ¶ 18). According to Scott, the steps do not violate any known or applicable code or standard (*id*., ¶ 19). The building was constructed in 1930, and all applicable work was based on the 1968 Building Code, none of which required guardrails, handrails, banisters or any other safety device (*id*.).

Scott avers that many of the codes relied upon by plaintiff are not applicable to the subject property or accident. Notably, he avers that sections 27-128, 27-375 and 27-558 of the 1968 Building Code are also inapplicable.

Alvin Ubell Affidavit (Plaintiff's Expert)

Alvin Ubell, a senior partner and vice president of Accurate Building Inspectors, located at 1860 Bath Avenue, Brooklyn, New York, and graduate of Pratt Institute School of Architecture, Brooklyn, New York, has over 50 years of experience in construction and renovation of homes, buildings and commercial properties. On November 10, 2016, Ubell inspected the stairs and storage closet in the women's locker room at NYC Elite. Ubell observed "a three-step configuration leading, at its summit, to a door that blocked entry into a small storage closet that was located behind the door at the top of the stairs" (Ubell aff, ¶ 4). Ubell also observed that there were no safety handrails or grab-bars near the stairs (*id*.).

Ubell also avers that the low profile stairs lacked an appropriate landing at the head of the stairs, has a locked door at the top of the stairs, and lacks a handrail, which should have been known to create an unstable condition for safe usability (*id*., ¶ 14). Ubell claims that these deficiencies are all in violation of various building codes dating back to 1916 (*id*., ¶¶ 18-20, 24, 25, 28).

Lease Terms

On July 13, 2009, Eldev Development Corp. and NYC Elite entered into a commercial lease for a 15-year term and attached rider (Lease). According to Robert Shaloff, bookkeeper of the building, both Eli Zabar and Devon Fredericks are principals of Eldev Development Corp. (Shaloff EBT at 11). Under article 4r of the Lease, entitled "Alterations," the parties agreed, among other things, that

> "Tenant shall indemnify and save the Landlord . . . against and from (i) any and all claims against Landlord . . . arising wholly or in part from any act, omission or negligence of Tenant. . .; (ii) all claims against Landlord arising directly or indirectly from any accident, injury . . . where such accident, injury . . . results or is claimed to have resulted wholly or in part from any act, omission or negligence of Tenant."

DISCUSSION

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp.*, 26 NY3d at 49 [internal quotation marks and citation omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In a premises-liability action, "liability for a dangerous condition is generally predicated on ownership, control or special use of the property" (*Colon v Corporate Bldg. Groups Inc.*, 116 AD3d 414, 414 [1st Dept 2014]). "A plaintiff alleging injury caused by a dangerous condition must show that defendant neither created the condition, or failed to remedy it despite actual or constructive notice thereof" (*Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Mere speculation is insufficient to sustain the cause of action (*Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 [2006]).

Here, the individual Zabar defendants move for summary judgment dismissing plaintiff's claims against them (motion sequence 002), on the ground that they lacked either ownership or control of the premises where plaintiff was injured at the time of her fall. NYC Elite moves for summary judgment dismissing defendants' third-party complaint against it (motion sequence 003). NYC Elite's position, in essence, is that plaintiff's negligence claims against the Zabar defendants fail as a matter of law because she cannot identify the cause of her fall without engaging in speculation. Since the Zabar defendants' claims against NYC Elite seek to require NYC Elite to hold the Zabar defendants harmless for any damages liability to plaintiff, the (asserted) failure of plaintiff's claims entails the dismissal of the Zabar defendants' third-party claims against NYC Elite as well.

NYC Elite's challenge in motion sequence 003 to the viability of plaintiff's negligence claims can potentially dispose of both the first- and third-party actions. This court therefore begins by considering that motion.[3]

NYC Elite argues that it is entitled to summary judgment as a matter of law because plaintiff cannot identify the cause of her fault without engaging in speculation. Although a

[3] Strictly speaking, NYC Elite's motion for summary judgment can be directed only to the Zabar defendants' third-party claims against NYC Elite. It is thus somewhat irregular for NYC Elite to frame its motion as directly attacking the viability of plaintiff's first-party claims in the original complaint. But plaintiff does not object to NYC Elite's approach; and she has fully responded to the substance of NYC Elite's arguments against her claims. This court therefore considers those arguments on their merits.

plaintiff in a premises liability lawsuit need not recall the exact manner in which he or she fell (*Cuevas v City of New York*, 32 AD3d 372, 372-373 [1st Dept 2006]), the plaintiff must identify enough for a trier of fact to find, based on logical inferences, that the defect proximately caused the accident (*see e.g. Alvarado v Grocery*, 183 AD3d 447 [1st Dept 2020] [the plaintiff's testimony that he believed he fell when the hand truck became stuck in a crack on either the first or second stair from the top of the stairway was a sufficient nexus between the condition of the stairway and the cause of his fall].

Plaintiff fails to satisfy that requirement here. In particular, plaintiff was unable at her EBTs to recall or describe the details of her fall—or what caused her to have fallen. To be sure, plaintiff did testify that she had long found the steps in question dangerous due to the placement of the door and the lack of a railing. But on this record any determination by the trier of fact that these asserted defects caused the fall in question would simply be speculation and conjecture (*see Dennis v Lakhani*, 102 AD3d 651, 652 [2d Dept 2013]; *Capasso v Capasso*, 84 AD3d 997, 998 [2d Dept 2011]). These evidentiary shortcomings are only underscored by plaintiff's testimony that she had gone up and down the steps to use the supply closet six days a week for four years while employed at NYC Elite, and had neither suffered any prior fall nor made a complaint about the steps. Plaintiff has not supplied any evidence connecting any defect in the design or condition of the steps to her fall down the steps on *this* particular occasion. On this record, absent some other basis on which to find NYC Elite negligent, plaintiff's claims fail as a matter of law (*see Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]).

Plaintiff attempts to supply this basis by the affidavit of her expert, Alvin Ubell. Ubell asserts that the structure of the steps, and in particular the lack of a handrail, violated various building and construction codes. This court concludes, however, that the codes relied upon by Ubell do not govern the steps at issue in this case (*see Lopez v Chan*, 102 AD3d 625 [1st Dept 2013] ["[T]he question whether Building Code provisions apply to a structure is an issue of statutory interpretation that the court should determine."]).

The building in question was built in 1930. "Pursuant to section 153 (6) of the 1916 Building Code, handrails are required only for interior stairs" (*Verderese v 3225 Realty Corp.*, 147 AD3d 637, 637 [1st Dept 2017] [internal quotation marks and citation omitted]). However, the 1916 Building Code and the 1929 Building Code, as discussed above, do not define "interior stairs." Therefore, "it is appropriate to consider the definition of subsequent Codes," namely the 1968 Building Code (*id.*). That code defines an "interior stair" as "[a] stair within a building, that serves as a required exit" (Administrative Code § 27–232). An "exit" is defined as a "means of egress from the interior of a building to an open exterior space." It does not, however, include "access stairs," which the code defines as a "stair between two floors, which does not serve as a required exit" (*id.*).[4]

[4] Plaintiff also cites New York City 1916 Building Code § 158 (2). That paragraph provides that "[t]he doors of any doorway required by this section shall be so hung and arranged that when opened they shall not in any way obstruct the required width of hallway, stairs, or other means of exit and, in the case of doorways leading directly to a street, shall not, in any position, project more than eighteen inches beyond the building line." But here, plaintiff testified that her fall occurred after she had already opened the door, gotten items from the closet, and turned around

Here, the photographs submitted by the parties here show two steps that do not serve as a means of egress from the interior of the building to an open exterior space. The steps are thus access, rather than interior stairs. And handrails are not required on access stairs (*see id*.; *see also Porto v Golden Seahorse LLC*, 177 AD3d 540, 540-541 [1st Dept 2019] [finding handrails not required on access stairs under the 1968 Building Code]; *Pwangsunthie v Marco Realty Assoc., L.P.*,136 AD3d 502, 502 [1st Dept 2016] [holding "motion court properly found that the two steps between the mezzanine and ground-floor level" constituted access stairs within the meaning of 1968 Building Code, and therefore, handrails were not required]).

Nor do the other statutes, regulations, and codes on which plaintiff relies support her claims. Multiple Dwelling Law § 52, which applies to stairs located in common areas of residential buildings, is not applicable to the commercial space here (*Kowalski v Johnson*, 247 AD2d 514 [2d Dept 1998]). To the extent that plaintiff alleges violations of the State Fire Prevention and Building Code, such codes are superseded in New York City by the City's Building and Fire Codes (*see* NY Exec Law §§ 373 [1], 383 [1] [c]; 19 NYCRR § 1202.1). 1968 Building Code § 27-558 deals with the design and installation of a railing, not with *when* a railing must be installed (or the design of steps without a railing). The 1938 Building Code provisions setting forth standards of interior stairs and dimensions of width of stair passageways and treads and risers apply only to stairs as a means of egress, and thus are inapplicable here. And 1968 Building Code § 28-301.1 is too general to serve as a basis for finding negligence liability (*see Miki v 335 Madison Ave., LLC,* 93 AD3d 407 [1st Dept 2012]).

This court therefore concludes that plaintiff's negligence claims fail as a matter of law. And the failure of those claims renders academic the Zabar defendants' third-party claims against NYC Elite (the subject of motion sequence 002).

Accordingly, it is hereby

ORDERED that NYC Elite's motion for summary judgment (motion sequence 003) is granted; and it is further

ORDERED that the complaint and third-party complaint are dismissed; and it is further

ORDERED that the Zabar defendants' motion for summary judgment (motion sequence 002) is denied as academic; and it is further

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to descend the stairs; she has thus failed to provide evidence establishing a connection between her fall and any obstruction caused by the door.

ORDERED that NYC Elite shall serve a copy of this order with notice of its entry on all parties; on the office of the General Clerk; and on the office of the County Clerk, which shall enter judgment accordingly.

HON. GERALD LEBOVITS J.S.C.

6/30/2020
DATE

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE